Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Implementation of Sections 3(n) and 332 of the Communications Act	)	
Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Bands	)	

REPLY TO OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION

SMR WON, under 47 C.F.R. §1.106, hereby replies to Nextel's and Motorola's oppositions to its Petition for Partial Reconsideration.

I. INTRODUCTION

SMR WON seeks reconsideration of the Commission's proposed "market overlay" auctions of 800 MHz spectrum. SMR WON challenged the Commission's auction authority, and requested reconsideration of the SMR spectrum attribution policy.

Nextel argued that: (1) all CMRS services are "potentially competitive," and 800 MHz SMR is not a separate product market; (2) the Commission's market overlay licenses are "initial licenses" and the FCC has the statutory authority to auction them; and (3) SMR spectrum should not be attributed on an equal basis with cellular and PCS. Motorola states that the anti-competitive issues are irrelevant to this proceeding. Motorola also supports the 10 MHz SMR attribution maximum.

II. THE 800 MHZ SMR MARKET IS A SEPARATE PRODUCT MARKET

To demonstrate that spectrum auctions are required, and that it is not monopolizing the 800 MHz SMR market, Nextel relies solely on the Commission's market definition. The FCC defines a single mobile marketplace, finding that "the wireless telecommunications competitive marketplace consists of those services which meet the consumer's desire to communicate on a real-time basis while on the move."[1/] The question is, can the FCC reasonably construct such a broad market definition?

The "interchangeability of use" standard for defining a "single product market" is inappropriate as a matter of law, and is not supported by the facts. Originally outlined in 1956 by the Supreme Court in United States v. E.I. du Pont de Nemours & Co., the "interchangeability" criteria does not suggest that the relevant product market should be defined simply by clustering all interchangeable products together. Having later reconsidered on its decision in du Pont, the Supreme Court substantially limited the weight of du Pont, without actually overruling the decision:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined relevant submarkets exist which, in themselves

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[1/] Nextel Opp. at 6, citing, Third Report & Order at ¶ 48-62 in which the FCC discusses the "reasonable interchangeability" test set forth in United States v. E.I. du Pont de Nemours, 351 U.S. 377 (1956).

> constitute relevant product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the products peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

Brown Shoe Co., v. United States, 370 U.S. 294, 325 (1961)(citation omitted)(emphasis supplied). In Brown Shoe, the government attempted to define the relevant market as footwear in general. This is similar to the FCC attempting to define the relevant market as mobile communications in general. The Court held, however, that the markets for men's, women's and children's shoes were each separate despite similarities in appearance, price, manufacture and manner of retailing of these shoes. Here, differences in paging, cellular, and SMR technology are even greater than the differences between men's, women's and children's shoes.[2/] Significantly, a product market need not meet all market indicia to be considered a distinct product market. See, e.g., United States v. Blue Bell, Inc., 395 F. Supp. 538, 541 (M.D.Tenn. 1975).

The Commission's failure to look beyond the universe of mobile telecommunication services that it deems "inter-changeable"-- in that they could all conceivably be used to communicate-- plainly ignores the identifiable distinctions that

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[2/] See EMCI SMR Market Study, submitted in this Docket as Exhibit D to SMR WON's January 5, 1995 "Comments" in the Further Notice of Proposed Rule Making, ___ FCC Rcd. ___, (Nov. 4, 1994), and incorporated herein by reference.

make paging, cellular telephone, and trunked SMR service separate submarkets. These distinctions, and the lessons of Brown Shoe, supra, were not lost upon the Justice Department when it concluded that:

> Conventional dispatch service is not a substitute for trunked SMR service because it affords lesser privacy and lower reliability. Cellular telephone service is not a substitute because it is significantly more expensive than SMR service, is significantly more difficult for customers to restrict communications to a defined fleet or group, and because it cannot be provided on a one-to-many dispatch basis.

See United States v. Motorola, Inc. and Nextel Communications, Inc., Proposed Final Judgment and Competitive Impact Statement, 59 FR 55705 (1994).[3/]

Paging is a limited form of mobile communication that is simply not an effective or efficient substitute for those consumers desiring low cost, two-way voice dispatch or intercommunicated communications. The possibility that two subscribers could engage in a fragmented and cumbersome "conversation" by relaying messages back and forth through voice pagers, does not make it a competitor to trunked SMR service. United States v. Grinnell Corp., 384 U.S. 563, 574 (1966)(a line of commerce need not be insulated from competition from other comparable services). Clearly, any user would consider paging an inferior substitute for voice mobile communication regardless of

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[3/] The FCC did not have the benefit of the Department of Justice's October 27, 1994 analysis when it released the Third Report and Order on September 23, 1994.

its cost in relation to SMR service. Accordingly, the two services cannot be deemed competitive. Id. at 574-75.

Cellular telephone service, while more closely related to SMR dispatch and interconnect service because both involve voice communications, likewise is considered by DOJ to be a separate mobile communications markets. DOJ found that the significant price differences, and difficulties in performing dispatch functions rendered the two markets separate.[4/]

Circumstances have changed, and new information has come to light since the FCC and DOJ analyses. Motorola and Nextel now both have admitted that the MIRS technology does not compete with cellular, and Nextel has shifted its primary focus to serving its core dispatch business.[5/] The Nextel/Motorola technology is not enjoying widespread consumer acceptance as a desirable substitute either for cellular or less complicated and costly traditional SMR service.[6/]

The Commission cannot base its rule making functions on wishes and hopes, and then build flawed legal theories around

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[4/] U.S. v. Motorola and Nextel, Proposed Final Judgment and Competitive Impact Statement, 58 FR 55705 (1994).

[5/] See SMR WON's Petition for Partial Reconsideration, Attachment A, at pp. 13-14. "The greatest marketing change would attempt to alter the perception that ESMRs would soon be a third cellular competitor, focusing instead on the integrated wireless services for dispatch..." Land Mobile Radio News, Vol. 48, No. 47, p. 1 (December 2, 1994). (Emphasis in original).

[6/] The FCC's rules for Petitions for Reconsideration specifically contemplate new information and changed circumstances as proper grounds for seeking reconsideration. 47 CFR § 1.106(b)(2) and (c)(1).

them to attempt justification. It must ground its decisions in the facts and marketplace. Otherwise, its conclusions are arbitrary and capricious, and its decisions are not based on fact:

> Jurisdiction is not acquired through visions of Valhalla. An agency can neither create nor lawfully expand its jurisdiction by merely deciding what it thinks the future should be like, finding a private industry that can be restructured to make that future at least possible, and then forcing that restructuring, in the mere hope that if it's there it will be used.[7/]

The results of ignoring the facts are obvious. The FCC's proposed regulations distort the SMR market, leaving many independent SMR operators scrambling to preserve their market-based businesses from inappropriate regulatory "solutions".

III. THE BUDGET ACT DOES NOT AUTHORIZE THE FCC TO CONDUCT MARKET OVERLAY AUCTIONS

Nextel asserts the FCC is proposing to auction an "initial license" for 800 MHz SMR "spectrum," and its proposal thus complies with the Budget Act. This is not "initial licensing." This is issuing a second license to competitors of existing licensees! The initial licenses remain in place under the FCC's proposal. Even the FCC does not agree with Nextel.

[7/] Midwest Video Corp. v. F.C.C., 571 F.2d 1025, 1045 (1978), affd., 440 U.S. 689, 99 S. Ct. 1435.

The FCC admits the spectrum already is licensed[8/] and that it merely is auctioning the right to buy out initial licenses.

Nextel's PCS/microwave relocation is not an appropriate analogy for this proceeding. The PCS and microwave facilities involve two distinct services which do not compete. The "voluntary/mandatory" relocation plan adopted[9/] could not be used by the PCS holder for anti-competitive reasons to injure a competing licensee. Therefore, a plan which permitted the new PCS licensee to initiate the relocation, or leave the microwave operator where he was, essentially protected the incumbent microwave user without anti-competitive effects.[10/] In contrast, licensing a second competitive operator in SMR permits the new MTA licensee to avoid relocating incumbents purely to keep the incumbents in an inferior competitive position.

[8/] The Commission itself acknowledges the lack of spectrum: "relocation is likely to be complicated as a practical matter by a lack of sufficient alternative frequencies in many markets to accommodate all incumbents in the MTA blocks on a one-to-one basis." Further Notice at para. 34. Surprisingly though, advocates of this proposal choose to ignore the impact of the lack of available frequencies on existing SMR operators.

[9/] "...incumbent licensees will not have to relocate unless requested to do so by an emerging technology licensee..." Memorandum Opinion and Order in ET Docket 92-9 (Reconsideration) 9 FCC Rcd 1943, 1947 at ¶32 (1994).

[10/] "Both APC and Cox emphasize that relocation is not punitive or unfair." Id. Here, relocation could be used for unfair advantage by the second MTA licensee. For example, limited "relocation" spectrum could be given selectively by the new MTA licensee to the weaker market competitors, leaving its larger SMR competitors without sufficient spectrum, with greater likelihood of interference to existing operation and without the opportunity to obtain the competitive "premiums" such as additional channels or geographic competitive equity, which would permit expansion.

The PCS/microwave proceedings also sought to reduce disruption and relocation of microwave users by finding as much vacant spectrum as possible in which to authorize the new PCS service. The FCC ultimately adopted a spectrum plan which significantly reduced the number of licensees who would have to be relocated.[11/]

> ...the cost and time required to relocate incumbent fixed microwave links should be significantly less in the lower band because the number of microwave links in the upper band is higher....

In contrast, 861-866 MHz is completely licensed throughout the nation, and would require massive relocation and disruption of competitors.

The FCC required that microwave operators be given "comparable" facilities. Indeed, if the facilities are not deemed "comparable," the incumbent has the right to relocate to its previous location.[12/] This is a fundamental and critical difference between the wide-area SMR proceedings -- here, there is no identified block of vacant "comparable" spectrum within which existing licensees may relocate.

Further, in the microwave proceedings, although the Commission recognized that certain incumbent operators would be subject to relocation -- "[o]ur analysis and studies submitted by the commenters indicate that the 2 GHz band is not fully used in

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[11/] Memorandum Opinion and Order in Gen Docket 90-314 (Reconsideration), 9 FCC Rcd. 4957.

[12/] Id.

all areas and that PCS operations may be implemented in many areas without affecting current fixed microwave operations."[13/] In contrast, in this proceeding the Commission itself acknowledges the lack of spectrum: "relocation is likely to be complicated as a practical matter by a lack of sufficient alternative frequencies in many markets to accommodate all incumbents in the MTA blocks on a one-to-one basis.[14/]

There is no relocation plan. The proposals put forward by the Commission are arbitrary, capricious, unfair to incumbents and cannot be implemented.

IV. THE COMMISSION SHOULD FULLY ATTRIBUTE ALL 800 MHz SMR SPECTRUM

Nextel's position that all CMRS services are interchangeable and potentially competitive is fundamentally incompatible with its position that SMR spectrum is not equivalent for purposes of the CMRS spectrum cap. Nextel argues that all CMRS services are the same for purposes of evaluating competitive markets. However, it then conveniently uses the existing structural differences to argue that the 800 MHz spectrum should not be attributed equally. This argument is clearly intended to ensure that Nextel continues to enjoy a monopoly position of the SMR market, and should be rejected as such.

[13/] Amendment of the Commission's Rules to Establish New Personal Communications Services Gen Dkt. No. 90-314, 8 FCC Rcd. 7700 ¶ 141 ("PCS Second Report and Order") (emphasis added).

[14/] Further Notice at para. 34.

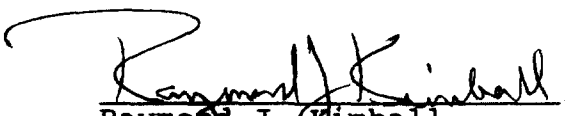
Nextel's associated "channel reuse" explanation for its monopolistic activities is a theory without factual support. Nextel has submitted no evidence that it is engaged in channel reuse in the states studied. As SMR WON members have challenged in the OneComm Transfer of Control proceeding,[15/] OneComm has sought to transfer to Nextel at least 15 licenses in the Western states of Washington, Oregon and Idaho in which as many as 313 channels are licensed to a single site! Nextel/OneComm have never explained how they will "re-use" these 3,777 channels from 15 traditional SMR sites.

Moreover, it is clear from Nextel's Comments submitted on January 5, 1995 in response to the FCC's Further Rulemaking in this docket, that it desires to control all of the 280 SMR channels in the SMR pool. Nextel is also in favor of mandatory retuning of incumbents, but opposes relinquishing any sufficient spectrum to make that program acceptable.

V. CONCLUSION

Based on the foregoing, SMR WON requests that the Commission reconsider its plan to conduct auctions of already licensed spectrum.

Respectfully submitted,



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Dated: January 30, 1995

[15/] Applications of OneComm Corporation and C-Call Corp. for Transfer of Control to Nextel Communications, File Nos. 90334-35.

CERTIFICATE OF SERVICE

I, Rose I. Dodson, a legal secretary in the law firm of Ross & Hardies, certify that I have this 30th day of January, 1995, caused to be sent by first-class U.S. mail, postage prepaid, a copy of the foregoing "REPLY TO OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION" to the following:

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